

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 541313 and MERCHANT MARINER'S DOCUMENT Z-1202226-DI
Issued to: JAMES E. CRAWFORD

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2345

JAMES E. CRAWFORD

This appeal has been taken in accordance with 46 U.S.C.239(g) and 46 CFR 5.30-1.

By order dated 10 November 1982, and Administrative Law Judge of the United States Coast Guard at New York, N.Y. suspended Appellant's seaman's documents for 12 months, upon finding him guilty of misconduct. The specification found proved alleges that while serving as Third Assistant Engineer on board the S.S. SANTA BARBARA under authority of the document and license above captioned, on or about 29 August 1982, Appellant assaulted and battered a fellow crewmember, James W. PARRISH, with a dangerous weapon, a wheel wrench.

The hearing was held at New York, N.Y. on 27 October 1982.

At the hearing, Appellant neither appeared nor was he represented by counsel. The Investigating Officer testified to jurisdictional facts concerning service of charges on Appellant and notice to Appellant of the date of the hearing. A plea of not guilty to the charge and specification was entered on his behalf by the Administrative Law Judge and the hearing proceeded in absentia.

The Investigating Officer introduced in evidence the testimony of the victim and one document.

At the end of the hearing, the Administrative Law Judge concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents issued to him for a period of twelve months.

The entire decision was served on 18 November 1982. Appeal was timely filed on 19 November 1982 and perfected on 15 February 1983.

FINDINGS OF FACT

On 29 August 1982, Appellant was serving as Third Assistant Engineer on board the S.S. SANTA BARBARA and acting under authority

of his license and document while the vessel was in the port of Valparaiso, Chile.

During the early hours of the morning, Appellant and an oiler named Parrish were on watch together in the engine room. A few hours earlier they had met in a bar and Appellant had started a fight with Parrish's companion; Parrish had separated them. While on watch, the earlier incident became the subject of an altercation between Appellant and Parrish. Appellant jumped up from his stool toward Parrish, but Parrish pushed him back to his seat. Appellant then picked up a four foot long wheel wrench and struck Parrish with it. Parrish threw Appellant to the deck and struck him twice with the wheel wrench. The Chief Engineer came upon the scene and stopped the fight.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's arguments are in the nature of a plea for clemency. He raises the following points:

1. He was not able to be present for the hearing due to severe headaches and due to his wife's illness.
2. Parrish had provoked him earlier in the voyage and, more immediately, by his bad language just prior to the incident.
3. Parrish hit him with the wheel wrench.
4. The suspension of his license causes him personal hardship.

APPEARANCE: Appellant pro se

OPINION

I

Appellant states that he was not able to be present during the hearing. I do not find reason in this statement to set aside or alter the order of the Administrative Law Judge.

It is clear from the record that Appellant had notice of the time and place of the hearing, together with notice of the means of requesting change thereof. While Appellant told the Investigating Officer that he expected to go back to Brazil and he didn't know whether he would be at the hearing or not, he never requested a change. As stated in Appeal Decision No.1688 (YOUNG), "An examiner will hear any reasonable request for postponement. When he hears

none, he has no choice but to proceed in absentia." Accord, Appeal Decision No. 2263 (HESTER). Proceeding in absentia is authorized by the regulations at 46 CFR 5.20-25, and does not serve as the basis for any alteration of the order.

II

Appellant alleges that Parrish had been provoking him during previous watches, and that "he provoked the fight by his bad language." This allegation does not help him.

I note that this allegation is new matter, not presented at the hearing. As stated in Appeal Decision No. 2186 (ASCIONE), "Affirmative defenses must be raised at the hearing and cannot be considered for the first time on appeal. It is therefore too late in the proceedings for the Appellant to assert a defense or matters in mitigation which he could have easily raised at a hearing which he voluntarily chose not to attend." Accord, Appeal Decisions Nos. 2289 (ROGERS), 2184 (BAYLESS), 1977 (HARMER).

Even if I were to consider the allegations, I could not find an excuse for Appellant's conduct in the provocations he alleges. "The only real provocation which justifies the use of force is an actual attack leaving the victim with no means of defense except the use of force." Appeal Decisions Nos. 2290 (DUGGINS), 1975 (GRADDICK); accord, Appeal Decision No. 1791 (LEE).

There is no reason to disturb the Administrative Law Judge's order.

III

Appellant states that Parrish hit him with the wheel wrench. This is consistent with the Administrative Law Judge's finding that after Appellant struck Parrish, Parrish struck Appellant. When, as in this case, the mitigating facts were before the Administrative Law Judge when he considered his order, and the order is not excessive or unreasonable, I will not modify it. Appeal Decisions No. 1989 (LE BOEUF); accord, Appeal Decisions Nos. 2236 (CLUFF), 1751 (CASTRONUOVO).

IV

Appellant pleads personal hardship, citing his residence in Brazil and consequent frequent unemployment, and the need to support his family. He also states that his license was due to expire in March 1983, and that denial of clemency will force him to seek Brazilian citizenship and a Brazilian license. These arguments do not persuade me to modify the order.

Personal hardship is a likely consequence of any order of suspension. It does not constitute grounds to modify an otherwise appropriate order. Appeal Decisions Nos. 2271 (HAMILTON), 1881 (DAVIS), 1666 (WARD), 1585 (WALLIS). Appellant's need for employment must be considered subservient to the remedial purpose of these proceedings, to promote safety at sea. Appeal Decision No.1516 (ALFONSO).

That Appellant's license was suspended when it expired will not prevent him from renewing it. He could have applied to renew his license while awaiting the end of the suspension period. 46 CFR 10.02-29(c). In addition, the suspension period ended well before the end of the permitted renewal period 12 months after the date of expiration. 46 CFR 10.02-9(d).

In light of Appellant's prior record, which consists of four previous suspensions, including two for assault and battery of superior officers, the order is more than justified and will not be disturbed.

CONCLUSION

There was substantial evidence of a reliable and probative character to support the finding of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations. The order is appropriate.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 10 November 1982, is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C., this 27th day of March, 1984.

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